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## “LAW AND LOGIC.”

THE ingenious writer of a leading article under this title, in the last number of the REVIEW (p. 39), seems to find in a book which he does me the honor to criticise, these three things :

1. An opinion, to use his own language, that “the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence ;” — as against which opinion he himself declares that “logic furnishes no test of relevancy,” adding that, “unless we permit the law to decide that question for us, it is not going to be decided at all.”

2. That a decision in *Grand Trunk Railway v. Richardson*, 91 U. S. 469, is “banished from the domain of law,” “because the court has excluded evidence which the author considers logically irrelevant.”

3. A statement that a certain proposition, decided by the whole Supreme Court, in *Richmond R. Co. v. Tobacco Co.*, 169 U. S. 311, is accounted for by the fact that the judge who wrote the opinion had his legal training in Louisiana.

The writer then adds certain views as to the nature of the common law and the operation of judicial precedents in our system.

Into these last matters I will not enter. But as to the others, I should like to say a word or two. I will take them in reverse order.

1. As to the Tobacco Company case, the remark criticised was that “perhaps *this exposition* may be accounted for,” etc. The allusion was not to the point adjudged, — relating to a very troublesome question in constitutional law, which was rightly disposed of, as I should think, — but only to the way this result was reached. In different parts of this opinion, a statute of Virginia, which was attacked as an unconstitutional regulation of interstate commerce, is explained as merely establishing “a rule of evidence,” and again as requiring the contract “to be embodied in a particular form.” These I think to be two different things. Neither of these theories is essential to the discussion. Both of them may well have been peculiar to the writer of the opinion ; any of the judges may have rejected either or both of them. In assuming that all the reasoning of the judge who gives the opinion is that of all the

judges who are silent in their assent to the judgment which it explains, the learned critic overlooks, for the moment, facts that are familiar to the legal profession.

2. As regards the Richardson case, it was cited in the book referred to — by a reference to a *particular page in the Report* — as illustrating the point that what are called questions in the law of evidence are very often, in reality, questions belonging to some other part of the law; a man, it was said, who mistakes the proposition of substantive law on which his case turns, and offers evidence accordingly, is often told that his evidence is not admissible, when the real thing meant is that he is wrong in his notion of the true proposition of the issue; for example, as to the true legal standard of diligence. This was one of several illustrations. The plaintiff in error, in Richardson's case, in repelling the charge of negligence, had offered evidence of "the usual practice of railroad companies in that section of the country." The court, in sustaining the rejection of this evidence, after stating that it is "impossible for us to see any reason" for admitting it, pointed out, on the page cited, what the issue was, and added: "Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides," etc. This I understand to be a statement that the plaintiff in error appears to be wrong in his conception of the true standard of negligence, and that the evidence was inadmissible upon the real issue. The citation of this passage seems to be a fair one, as illustrating the point to which it is applied. With the soundness of the decision, in rejecting the evidence, I was not, and am not now, concerned.

When, therefore, the critic asks, "On what ground is this case banished from the law?" the question is wide of the mark. It is not "banished from the law." It is used as furnishing, in a particular argument of the judge, an illustration for a remark in the text, — a remark which has to do with the exclusion of certain matters from the law of evidence, but not at all with excluding them from "the law."

3. This brings me to the main point, viz., what the critic says as to the theory of the law of evidence which is put forward in the book referred to. That theory is that our law of evidence is a *rational* system, as contrasted with certain older modes of proof; that in admitting evidence in our law, it is always assumed to be logically probative, *i. e.*, probative in its own nature, — according to the rules that govern the process of reasoning; that the consider-

ations determining this logical quality are not fixed by the law, and that, so far as legal determinations do proceed merely on such considerations, they do not belong to the domain of law; that the law of evidence, however, *excludes* much which is logically good, that is to say, good according to the tests of reason and general experience; and that the rules of exclusion make up the main part of the law of evidence. The reasons for these views, and the details and qualifications of them, are not for this place: they are indicated in the book referred to.

Now this book uses the word "relevancy" merely as importing a logical relation, that is to say, a relation determined by the reasoning faculty. The word "admissibility" is the term which it applies to the determinations of the law of evidence. The critic seems not to observe this; and his remarks, for this reason, are in some respects inapplicable to the text that he is dealing with; as when he says that "logic furnishes no test of relevancy."

I confess that I do not know what he means when he imputes to me the doctrine that "the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence." So far as I perceive the meaning of this passage, it seems to be a senseless opinion. The law of evidence begins—at least its main function begins—when it excludes matter logically probative, for one or another of the many practical reasons that have shaped its principles and its rules. That irrelevant matter is to be excluded is matter of course; that is to say, such matter is outside the very notion of "evidence," in a rational system of evidence like ours.

The critic appears to me to be entirely right in saying that the judgment of a court "has the same value in this branch of the law that it has in any other branch." Doubtless, it settles the particular case. It stands also, if it does stand, as a precedent to help settle other like cases. But bad reasoning in the law of evidence, like bad reasoning in all other parts of the law, is simply bad reasoning; and it is never good law. It may, to be sure, change the law; and the result reached by it may stand as a new proposition in the law of evidence, as in any other part of the law. But the bad reasoning itself never passes into a precedent having legal authority. It is always open to question. The law has no orders for the reasoning faculty, any more than for the perceiving faculty,—for the eyes and ears.

Of course I agree entirely with the critic that our courts are not engaged in reaching "mathematical conclusions," or in merely logi-

cal, abstract, or academic discussions. For the evidence of this agreement I respectfully refer him to the book in question, — *passim*. It is with entire satisfaction that I look on at the destruction by the critic of that man of straw put forward in his paper who seems to have entertained a different opinion.

*J. B. Thayer.*

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